Excel Corporation *and* United Food and Commercial Workers International Union, Local 576, AFL–CIO. Cases 17–CA–18638 and 17–CA–18694–1

September 22, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On March 3, 1997, Administrative Law Judge Albert A. Metz issued the attached decision. The Respondent filed exceptions and a supporting brief, the Charging Party filed an answering brief, and the Respondent filed a brief in opposition to the answering brief. The Charging Party also filed cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Excel Corporation, Marshall, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent and the Charging Party each have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We note that no exceptions were filed to the judge's dismissal of the allegation that the Respondent unlawfully interrogated employees Heuman and Young by asking them why they were wearing union insignia.

In adopting the judge's conclusion that the Respondent violated Sec. 8(a)(1) of the Act by interrogating employee Nicholson, Chairman Gould finds it unnecessary to rely on *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

Mary G. Taves, Esq., for the General Counsel.
Robert D. Overman, Esq., for the Respondent.
Robert J. Henry, Esq. for the Union.

DECISION

ALBERT A. METZ, Administrative Law Judge. This case was heard at Marshall, Missouri, on November 18–20, 1996.[1] The United Food and Commercial Workers International Union, Local 576, AFL–CIO, CLC (Union) has charged that Excel Corporation (the Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

The Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

I. BACKGROUND

The Respondent operates a pork processing plant in Marshall, Missouri. Starting in early 1996 the Charging Party Union and the Laborers Union began organizing campaigns at this facility. At the time of the hearing the plant remained nonunion.

II. UNFAIR LABOR PRATICE ALLEGATIONS

A. *Supervisor Glen Moore*

Respondent's employee, David Davis, worked next to employee Mike Helveston. Davis recounted how in March Supervisor Glenn Moore approached Helveston on the production line. Moore noticed that Helveston was wearing a Laborer's union insignia on his hard hat and commented that he liked the sticker. Helveston responded, ''Oh, you like that.'' Moore retorted, ''Yeah, I can't wait to make your life miserable.'' Helveston said, ''Yeah, that can work two ways.'' Moore replied, ''Yeah, but you'll lose.''

Moore admitted mentioning the union sticker to Helveston but denied saying anything threatening concerning its display. Moore, who testified that he had seen the downside of unions, said he told Helveston that unions made a lot of peoples' lives miserable. Helveston, who is no longer employed by the Respondent, did not testify.

Davis was a credible witness who gave a detailed account of the incident. Davis is still employed by the Respondent and this is a consideration when assessing his credibility. *Flexsteel Industries*, 316 NLRB 745 (1995); *Stanford Realty Associates*, 306 NLRB 1061, 1064 (1992). Moore was less persuasive in his denial. Comparing the testimony and the demeanor of the two witnesses I credit Davis' version of the encounter. I find that the Respondent violated Section 8(a)(1) of the Act by threatening Helveston with unspecified reprisals for wearing the union sticker.

B. *Supervisor Fangman's March 14 Encounter with Employee Damon*

In early March the Respondent moved its belly derind department to a new location. The new area is referred to as Bay 8 and approximately 15 employees worked in the department in March. The move caused problems as far as the workers were concerned. They complained that large overhead fans caused excessive noise and blew cold air on them. They also objected to the setup of the line because they perceived some workers had to work dangerously close to each other. There were complaints involving the need to use hand knives because power equipment had not been setup. These and other complaints were voiced to supervision but did not result in solutions that satisfied the employees.

On March 13 the Bay 8 employees had a meeting in the plant conference room with their immediate supervisors, James ''J.T.'' Terry and Leroy Gerkin. The employees

[1] All dates refer to 1996 unless otherwise stated.

voiced their complaints about working conditions. The supervisors told the employees they were aware of the problems and were working to correct them as quickly as possible.

At lunchtime on March 14 the Bay 8 employees were still dissatisfied over the lack of improvement in their working conditions. The group decided not to return to work until they could talk to higher management about the situation. Supervisor Terry soon found the Bay 8 employees not working. After some discussion a meeting was arranged in the conference room with plant operations Manager, Doug Fangman. In attendance were all of the Bay 8 employees, and Supervisors Fangman, Terry, and Gerkin. The employees were boisterous at the start of the meeting and Fangman demanded order. Particularly agitated were employees Jeff Griggs and Fred Damon. The employees voiced their concerns to Fangman. He told the employees that the changes they wanted could not be done overnight and the Respondent was doing its best to make the required corrections. Fangman told the employees that the Respondent did not condone their method of obtaining the meeting. Fangman finally concluded the meeting and told the employees to return to work.

Damon was an active union supporter and wore union stickers on his hard hat. He testified that as he was leaving the conference room, Fangman grabbed his arm and pulled him close to Fangman's face. Damon recalled that Fangman angrily said not to fuck with him, that he knew Damon was the leader, and he was not going to allow Damon to organize the group. Fangman added that before he would let that happen he would fire every damn one of them. He then released Damon who left the room. As Damon walked away Supervisor Gerkin came up to him, put his arm around him and assured him that everything was going to be okay.

Employee Howard Duckworth testified that he was one of the last to leave the conference room. He observed Fangman grab Damon and pull him toward him. Duckworth could see that Fangman was angry and heard him tell Damon, ''You need to stop getting these people all wound up.'' He then pushed Damon away.

Fangman admitted that he did stop Damon as he left the meeting. Fangman testified that he only wanted to see if Damon was all right as he appeared upset in the meeting and he did not want him to return to work in an agitated state. Fangman testified that he told Damon they had discussed ''our issues, let's settle down and go back to work.'' Fangman denied that he grabbed Damon, threatened him, or mentioned the employees' organizational activities.

Damon and Duckworth were credible witnesses whose demeanors were convincing. Fangman did not present a persuasive demeanor when he denied threatening Damon. As found below, Fangman was clearly angered by the employees' work stoppage and subsequently had another hostile encounter with Damon. I find that Fangman's conduct of grabbing Damon and threatening the employees with discharge for engaging in union or other protected concerted activities is a violation of Section 8(a)(1) of the Act.

C. *Fangman's March 15 Meeting With Bay 8 Employees*

The following day, March 15, the Bay 8 employees were told to attend another conference room meeting. All of the department employees were present along with Supervisors Fangman, Terry, and Gerkin. Several employees testified to what occurred at the meeting. In sum, Fangman opened the meeting by telling them that he had thought over their actions of refusing to go to work on the previous day. He stated the more he thought about it the madder he got and that he was not going to tolerate their actions. He then gave each of them a disciplinary form that read:

> I was explained the proper method of requesting a meeting.
>
> I have been informed that not returning to my work station on time after break is in direct violation of company rules.
>
> I realize that future occurrences of the incident of 3/14/96 will result in severe disciplinary action up to discharge.

The employees were told to sign the disciplinary forms. One employee asked what would happen if they refused to sign. Fangman replied that they would sign the forms or be terminated. He said he could replace every one of them. Each employee was required to sign the form and it was placed in their personnel file.

Fangman conceded the Bay 8 employees were required to sign the form. He remembered saying something about ''the more he thought about the matter,'' but denied that he was angry. He testified that he did not believe he said he would fire the employees. Although Supervisor Terry was called to testify by the Respondent he was not asked about this meeting. Supervisor Gerkin did not testify at the hearing.

The employees' testimony showed that they were strongly impressed by this significant event in their working lives and that they had clear recollections of what occurred. Fangman in contrast was not believable in his denial that he was angry or in his recitation of what he said to the employees. I also draw an adverse inference from the fact that Supervisor Terry was not questioned about the meeting and that Supervisor Gerkin was not called to testify about the event. I conclude that had they testified concerning this meeting their testimony would have been contrary to Fangman's version of events. *International Automated Machines*, 285 NLRB 1122–1123 (1987). Considering the demeanor of the witnesses and the weight of the evidence I credit the employees' version of what occurred at this meeting.

It is well established that employees are free to engage in protected work stoppages concerning their working conditions. *Washington Aluminum*, 370 U.S. 9 (1962). I find that the Bay 8 employees were engaged in such protected concerted activity when they stopped work in protest of their employment conditions. The employees were given the warning forms in retribution of their protected activity. Additionally, Fangman's remarks to Damon about his union activities the previous day is evidence that the disciplinary forms were issued, at least in part, because of the employees' union activities. I find that the Respondent violated Section 8(a)(1) and (3) of the Act by giving the written warnings to the Bay 8 employees. *Astro Tool & Die Corp.*, 320 NLRB 1157 fn. 1 (1996). I further find that the Respondent violated Section 8(a)(1) of the Act by threatening the employees with discharge if they did not sign the disciplinary forms or if they engaged in future protected acts.

D. *Fangman's Second Encounter With Damon*

A couple of days after the March 15 meeting Damon was in the plant cafeteria reading some union papers he had found on a table. Fangman approached and asked him if the papers were ''some of your shit.'' Damon replied that they were not his and he was just reading the material. Fangman said he ''would take care of this shit.'' He then took a stack of union material from the table, walked to the trash can and threw the material away. Fangman returned to where Damon was sitting and holding union papers in his hand. Fangman said he would ''take care of that shit, too,'' and grabbed the papers from Damon's hand. Fangman again walked to the trash receptacle and threw away the papers. Damon immediately got up and left the cafeteria.

Fangman denied that he had ever said anything to Damon about union handouts or had snatched such materials from him. Fangman admitted that on occasion he had thrown away union materials that he saw on unoccupied cafeteria tables.

Fangman's demeanor and his denial that this encounter had occurred were not credible. Damon, in contrast, presented a very believable demeanor and a detailed account of what had happened. It was apparent that he was shaken by being accosted in such manner by the second highest ranking supervisor in the plant. I credit Damon's account of events. I find that Fangman's actions in coercively interrogating Damon about the union materials and taking such papers from him are violations of Section 8(a)(1) of the Act.

E. *Interrogations by Supervisor Bret Getzel*

Supervisor Bret Getzel testified that he knew employees Sherry Heuman and her husband, Wayne. Getzel had been told by Wayne on several occasions that he was dissatisfied with his treatment by the Union. In mid-April Getzel noticed that Sherry Heuman was wearing a union sticker and asked her why she was wearing the insignia. Employee Sue Nicholson related that Getzel also approached her in April while she was working. Nicholson was an open union supporter. Getzel asked Nicholson what the difference was between the UFCW and the Laborers. She explained her understanding of the differences. Getzel then asked her how many cards the UFCW had signed. Nicholson replied she did not know. Nicholson recalled that on another occasion at around quitting time Getzel asked her why she was wearing a union T-shirt. She told him because she believed ''in him.'' Employee Bryan Young testified that Getzel also asked him in approximately July why he was wearing a union T-shirt.

Getzel stated that, ''I have no experience with the union prior to this point [the union organizational campaign] and so I wasn't well-versed and well-schooled in what was . . . allowed under . . . labor laws.'' Getzel denied that he had any conversation with Nicholson about the UFCW or Laborer's Union or questioned Young about his union T-shirt. Getzel did admit to asking Heuman about her union sticker. He did so out of curiosity because of her husband's prior antiunion expressions.

Interrogation of an open and active union supporter violates Section 8(a)(1) of the Act when, under all the circumstances, the interrogation reasonably tends to restrain, coerce, or interfere with employees' rights guaranteed by the Act. *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). In applying this test the Board examines the background, the nature of the information sought, the identity of the questioner, and the place and method of the interrogation. Considering the demeanor of the witnesses and the weight of the evidence, I find that Getzel did engage in the interrogations attributed to him by Heuman, Young, and Nicholson. The interrogations were directed at employees who were visible union supporters. Getzel was a first line supervisor at the time of the interrogations. His inquiries took place in relative open areas, were unaccompanied by threats or promises of benefit, and were very short in duration. I find Getzel's general inquiries to Heuman and Young as to why they were wearing union insignia were not, under all the circumstances, violative of the Act. More troubling is the interrogation of Nicholson which included the inquiry as to how many union authorization cards the Union had received. This inquiry goes to the union activities of other employees and the general progress of the organizing campaign. Moreover, when viewed against the background of other supervisors' unlawful conduct described above, this interrogation is more coercive. I find that, under all the circumstances, the interrogation of Nicholson about the employees' card signing is a violation of Section 8(a)(1) of the Act. *Cumberland Farms*, 307 NLRB 1479–1480 (1992)

F. *Plant Manager Lincoln Woods— Handouts to Employees*

The complaint alleges that Lincoln Woods, Respondent's Plant Manager, threatened employees with loss of benefits and told them that it would be futile to select the Union as their collective bargaining representative. Two exhibits were introduced in support of these allegations. (G.C. Exhs. 5 and 6.) These exhibits are copies of Respondent's antiunion propaganda issued in the plant on March 1 and July 23. Respondent asserts that the documents were in response to Union propaganda and are protected speech under Section 8(c) of the Act.

The March 1 handout discusses the Marshall plant employees' higher wages when compared to Respondent's other pork plants. The memo states in pertinent part:

> If the Union is telling your [sic] that if they were in, you would be making wages other than what you are now making, they are simply wrong! If they represented you, the law allows them to negotiate for you. That is all! Wages and benefits can be negotiated downward.

The handout also discusses ESOP/401(K) retirement matching funds paid by the Respondent to employees and overtime and holiday week benefits. As to both benefits the document states:

> We do not intend to negotiate this benefit for any Excel unionized facility in the future.
>
> . . . .
>
> If the Union is telling you wages and benefits can only go up, they are not giving you all the facts. The law allows the company to negotiate wages and benefits down. Do not take a chance on your wages and benefits.

The July 23 handout disputes union propaganda regarding various benefits. A similar theme found in the March memo is repeated:

> No Excel unionized facility has this benefit (ESOP/401(K)) and we do not intend to negotiate this benefit for any Excel unionized facility in the future. Are you willing to go on STRIKE if the company insisted during negotiations that this benefit be eliminated?

The Respondent's theme in these documents is the futility of collective bargaining. The two papers declare, without reservation, that the Respondent does not intend to negotiate certain benefits at union represented plants. The March paper cautions that the employees should not take a chance as to their wages and benefits. The July paper rhetorically asks if employees would be willing to strike if the Respondent insisted on not bargaining about such benefits. Considering the message as a whole, I find that the Respondent did violate Section 8(a)(1) of the Act by implying that collective bargaining is futile and telling employees that it would not negotiate about certain benefits if the Union represented them.

G. *Events Involving Sue Nicholson*

1. Alleged harassment by Supervisor Getzel

Employee Sue Nicholson was a leader of the Union's organizing efforts at the plant. She held union meetings at her home, attended union meetings, distributed handbills, got authorization cards signed, and wore union insignia. In the first half of 1996 Nicholson worked as a shoulder separation saw operator. Her supervisor was Bret Getzel. She had a precarious relationship with Getzel which she described as worsening when she started openly supporting the Union's organizing campaign. As examples of the deteriorating relationship she cited Getzel constantly criticizing her work and turning a water spray on her saw blade that splattered her when she worked.

Getzel described Nicholson's work at the first part of the year as generally above standard but at times it would slip. To correct lapses in Nicholson's performance, Getzel would coach her on the proper way of doing the work. Getzel also enlisted the help of another employee, Glen Parks, to train Nicholson. Parks worked with Nicholson two or three times to improve her performance. Nicholson was twice counseled because her production was below 70 per cent of what was expected. Getzel denied that he harassed Nicholson about her performance after she started openly displaying her support for the Union. Nicholson did not dispute Getzel's testimony that her production was at time substandard. Employee Mike Lefevers also had his problems with Getzel. Lefevers candidly admitted that Getzel did not let anyone perform poorly without attempting to correct the situation. Lefevers worked directly across from Nicholson and did not observe Getzel engaging in behavior that he thought was harassing of Nicholson.

Nicholson described how a water device was placed on her saw near the end of February. The water was not activated until approximately the end of March. Nicholson testified that the water was designed to spray off the bone meal, particles of fat and meat that were built up in the saw. She objected to the water because it would splatter on her. Nicholson said that when others operated her saw she did not believe the water was turned on the machine. Nicholson complained to plant manager, Lincoln Woods, about the matter in early April and stated he told her there should not be water on the saw. Nicholson said this was one of the subjects discussed in a subsequent departmental meeting with Woods. The water, however, was not turned off on the machine. Getzel denied that Lincoln Woods had ever told him that water should not be used on the saw.

The water had been used on Nicholson's machine when the plant was operated by a predecessor company. At some point the line was changed and the water was not on the saw for a period of time. When Getzel began supervising the operation he was unaware that water had been on the saw. He later took a training trip to Respondent's Beardstown, Illinois plant and observed water being used on a similar saw. He liked the fact that the 180 degree hot water dribbling on the saw removed the fat build-up and allowed for a more precise cut on the meat. After Getzel returned from his training he had water installed on Nicholson's saw. Getzel testified that all operators of that saw were required to keep the water on to improve the cuts. He conceded that it was an almost daily routine that he made sure the water was operating. Nicholson ceased working in Getzel's department on June 19. The water has consistently been used on the saw since that time.

While Nicholson was upset by the use of the water, the Respondent's evidence convincingly showed that the device was not used as a means to harass her. The predecessor employer had used water on the saw. The uncontroverted evidence showed that the Respondent's sister plant uses a similar device. The water is still being used on the machine despite the fact that Nicholson has not worked on that saw for many months. Likewise, Getzel's coaching and comments as to Nicholson's works were not shown to have resulted because of her union activity. It is uncontroverted that Nicholson at times fell below production standards. Her counseling included help from other employees. Lefevers who worked across from her did not notice any heightened supervision of Nicholson's work. On the basis of the record as a whole I find that the Government has failed to prove by a preponderance of the evidence that Nicholson was harassed because of her union activities. *Wright Line*, 251 NLRB 1083 (1980).

2. Nicholson's June 19 suspension

Sue Nicholson did not like working under Getzel's supervision. As a result she bid on a job as a loin trimmer in a different department. In early June she was allowed to work a few hours a week at that job. On June 18 she was told that the company nurse would have to clear up a workmen's compensation restriction in her record before she could work permanently in the loin trimmer job. Nicholson had suffered an on the job injury while working for a predecessor company at the plant.

On the morning of June 19 Nicholson reported to the loin trimmer job. She was told by Supervisor Sassman that she needed to go to her old job as the nurse needed to clear up her medical restrictions concerning her new job. This conversation was very early in the morning and the nurse had not arrived at work as of that time. Nicholson admittedly was very agitated by this turn of events and sought out higher supervision to determine why she was not allowed to work the

new job. Nicholson found Richard Kidd, superintendent of the cut floor, and discussed the matter with him. Kidd promised her he would talk to the nurse as soon as she arrived at work. In the meantime Nicholson was told to return to her former job under Getzel. Kidd then spoke with Getzel and told him he was concerned about Nicholson who was visibly distraught. Kidd told Getzel to keep an eye on her to insure she was working safely around her electric saw.

Nicholson returned to her former shoulder saw station and commenced work. Bryan Young, an employee working nearby, saw that Nicholson was troubled and told her to, ''Cheer up.'' Nicholson yelled, ''Fuck you.'' Nicholson admitted, ''I was upset, to say the least.'' Getzel observed Nicholson shouting at Young and, although he could not hear what she said, he could tell she was anguished. Getzel testified he could see her face was flushed and it appeared that she had been crying. He determined that he had to defuse the situation so he went to Nicholson's work station. He tapped Nicholson on the shoulder to gain her attention as the plant is noisy and the employees wear ear protection. Getzel told her she was doing a good job, to relax and have a good day. Nicholson shouted at him to get away from her. He told her to relax and she again shouted to get away. Nicholson then threw a slab of meat off the line which grazed Getzel in the thigh and fell to the floor. The meat did not injure Getzel. The slabs of meat that Nicholson worked on weigh approximately 16 to 22 pounds.

Nicholson's subsequent written statement of the encounter relates that: ''At no time was I ever going to do physical harm to him (Getzel) even though my dislike for the man is terribly strong.'' (G.C. Exh. 17(b).) Nicholson testified that she was trying to throw the meat behind her into a barrel used for that purpose. The meat she threw, however, landed on the floor and was thus considered contaminated. After the meat fell to the floor Nicholson stepped away from the saw. Getzel had to take over her job as the meat coming down the line was accumulating at her station. Getzel yelled across the line at employee Mike Lefevers to get someone to take over the saw work. Lefevers observed that Nicholson had angrily flung meat behind her towards Getzel. He also noted that she was crying and that she walked away from the line. Nicholson went to her husband's work station and told him she was feeling ill. She then went to nurse's office.

Later in the morning Nicholson's work restrictions were clarified when the nurse reviewed her medical record. Nicholson was then allowed to start work on her new job as a loin trimmer. In the meantime higher management had been informed of the confrontation between Getzel and Nicholson and an investigation was begun. Nicholson, Lefevers and Getzel were called to the office and gave written statements of the event. After this preliminary investigation, Nicholson was indefinitely suspended pending further consideration of the matter. Nicholson recalled she was told she was being suspended ''for use of profanity on the line and [for] . . . being belligerent.'' The initial notations on Nicholson's disciplinary record state that her violation concerned: ''General policy & rules—Use of profanity, leaving the line w/o relief.'' A notation was later added that states: ''Violation of safety rules.''

Getzel recommended to Human Resources Manager, Joan Kelly, that Nicholson be discharged. Kelly rejected that suggestion and decided that a written warning and five day suspension were appropriate discipline. Nicholson was informed of the suspension and her personnel action record was amended with the notation: ''Altered to a five-day suspension for violation of safety policy. Any future violation of company policy will result in disciplinary action up to and including discharge.'' Nicholson signed the disciplinary record and began the five day suspension. She returned to work after the suspension period and, at the time of the hearing, continued to work as a loin trimmer.

The record establishes that employees regularly use profanity on the plant floor while working. The evidence was mixed as to the disciplinary treatment of employees who used profanity in angry situations or violated safety rules. The record does, however, show that profanity and safety violations had been disciplined in certain situations, including incidents which resulted in the discharge of employees.

3. Analysis of Nicholson's suspension

The General Counsel has the initial burden of establishing that union activity was a motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3). The elements commonly required to support a showing of discriminatory motivation are union activity, employer knowledge, timing, and employer animus. Once such unlawful motivation is shown, the burden of persuasion shifts to the Respondent to prove its affirmative defense that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Manno Electric*, 321 NLRB 278 (1996). The test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984). ''A finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel.'' *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. sub nom. 705 F.2d 799 (6th Cir. 1982).

Nicholson's union activities were very public and included wearing union insignia, handbilling at the plant, and being questioned by Getzel about her union activities. The timing of her suspension was in the midst of an ongoing union organizational campaign. The violations of Section 8(a)(1) and (3) of the Act discussed above are evidence of the Respondent's animus concerning the Union. Thus, I find that the Government has established a foundational showing that part of the motivation for Nicholson's suspension was her union activities.

The record, however, shows that Nicholson was not purposely provoked by the Respondent on the morning of June 19. The medical staff's concern for clarifying Nicholson's physical restrictions was shown to be legitimate. The physical limitations were promptly reviewed when the nurse arrived at work and Nicholson was approved for permanent duty in her new job. Nicholson's anger on the morning of June 19 was based on her perception that it was unjust that she should temporarily resume duties under Getzel's supervision. Nicholson's frustration, which resulted in her angry encounter with Getzel, was of her own making. Nicholson's discipline has not been shown to be extraordinary in light of

her agitated profanity toward Young and her emotional reaction of pushing meat at Getzel. The Respondent's response to Nicholson's conduct was sufficiently proven to have been action that would have occurred regardless of her protected concerted activities. I find that the Respondent did not violate the Act by suspending Nicholson. *Wright Line*, supra.

CONCLUSIONS OF LAW

1. Excel Corporation is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The United Food and Commercial Workers International Union, Local 576, AFL–CIO, CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by engaging in the following conduct:

(a) Threatening employees with unspecified reprisals for wearing union insignia.

(b) Physically accosting an employee and threatening employees with discharge for engaging in union or other protected concerted activity.

(c) Threatening employees with discharge if they did not sign unlawful disciplinary forms.

(d) Coercively interrogating an employee concerning union materials and physically taking such materials from the employee.

(e) Telling employees that collective bargaining is futile and that it would not negotiate certain benefits if the Union represented them.

(f) Interrogating an employee as to how many union authorization cards the Union had received.

4. Respondent violated Section 8(a) (1) and (3) of the Act by giving employees disciplinary forms because they had engaged in union or other protected concerted activity.

5. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent has not violated the Act except as herein specified.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent shall be required to remove from its files the disciplinary notices the Bay 8 employees were required to sign on or about March 15, 1996. The Respondent is further required to notify the Bay 8 employees in writing of the removal of the disciplinary notices and that such warnings will not be used against them in any manner.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Excel Corporation, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with unspecified reprisals for wearing union insignia.

(b) Physically accosting an employee and threatening employees with discharge for engaging in union or other protected concerted activity.

(c) Threatening employees with discharge if they do not sign unlawful disciplinary forms.

(d) Coercively interrogating an employee concerning union materials and taking such materials from the employee.

(e) Telling employees that collective bargaining is futile and that it would not negotiate certain benefits if the Union represented them.

(f) Interrogating an employee as to how many union authorization cards the Union had received.

(g) Giving employees disciplinary forms because they had engaged in union or other protected concerted activity.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, remove from its files the disciplinary notices the Bay 8 employees were required to sign on or about March 15, 1996. Within 3 days thereafter the Respondent shall notify these employees in writing that this has been done and that the warnings will not be used against them in any way.

(b) Within 14 days after service by the Region, post at its facility in Marshall, Missouri, copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 15, 1996.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommend Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten our employees with unspecified reprisals for wearing union insignia of the United Food and Commercial Workers International Union, Local 576, AFL–CIO, CLC or any other union

WE WILL NOT physically accost employees or threaten them with discharge for engaging in union or other protected concerted activity.

WE WILL NOT threaten employees with discharge if they do not sign unlawful disciplinary forms

WE WILL NOT interrogate our employees concerning union materials nor will we take such materials from them

WE WILL NOT tell our employees that collective bargaining is futile and that we would not bargain about certain benefits if a union represents them.

WE WILL NOT interrogate our employees as to how many authorization cards a union has received from our employees.

WE WILL NOT give our employees disciplinary forms because they have engaged in union or other protected concerted activity

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful written disciplinary warnings that Bay 8 employees were required to sign on or about March 15, 1996, and WE WILL, within 3 days thereafter, notify each Bay 8 employee in writing that this has been done and that the warnings will not be used against them in any way.

EXCEL CORPORATION